

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILLIAM L. NELSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. C05-643JLR

ORDER

**I. INTRODUCTION**

This matter comes before the court on Respondent's Motion to Dismiss Petition to Quash IRS Summons (Dkt. # 9). Having read the papers filed in support of and opposition to this motion, and having heard oral argument, the court GRANTS Respondent's motion to dismiss.

**II. BACKGROUND**

Petitioner William L. Nelson filed suit against Respondent United States (the "Government") when the Internal Revenue Service ("IRS") issued a summons to a third-party bank where he keeps an account. The Government argues that Nelson's petition should be dismissed based on Nelson's failure to file his complaint within 20 days of

1 receiving notice of the summons.<sup>1</sup> 26 U.S.C. § 7609(b)(2)(A). In response, Nelson  
2 contends that his petition is timely under the equitable tolling doctrine. Prior to filing  
3 suit, Nelson sent a complaint letter challenging the summons to various government  
4 officials and agencies within the 20-day deadline. Nelson argues that this letter  
5 constitutes a defective pleading warranting the application of equitable tolling.  
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### 7 **III. DISCUSSION**

#### 8 **A. Legal Standard**

9 Although the Government seeks to dismiss this case under Fed. R. Civ. P.  
10 12(b)(1), the Government's motion more properly falls under Fed. R. Civ. P. 12(b)(6).  
11 Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995)  
12 (recognizing "federal statutory time limitations on suits against the government are not  
13 jurisdictional in nature" and therefore should be raised "through a Rule 12(b)(6) motion  
14 to dismiss for failure to state a claim, not a Rule 12(b)(1) motion to dismiss for lack of  
15 jurisdiction.") (quotation and citation omitted). The court will not dismiss a complaint  
16 for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no  
17 set of facts that would establish the timeliness of the claim." Id. at 1207. When  
18 considering a motion to dismiss based on the alleged expiration of a statute of limitations  
19 period, the court must determine whether the complaint, read liberally, alleges sufficient  
20 facts to toll the limitations period. Id. at 1206. The court need "not, however, necessarily  
21 assume the truth of legal conclusions merely because they are cast in the form of factual  
22 allegations." W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981); Warren v.  
23 Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).  
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28 <sup>1</sup>The IRS issued the summons on March 10, 2005, and Nelson filed a petition to quash the  
summons in this court 25 days later, on April 4, 2005. Petition, Dkt. # 1.

**B. Petition to Quash**

To challenge a third-party summons issued by the IRS, an individual must “begin a proceeding to quash such summons not later than the 20th day after the day such notice is given.” 26 U.S.C. § 7609(b)(2)(A). The Ninth Circuit and several district courts have held that this limit is jurisdictional and have dismissed cases where petitioners failed to file within the 20-day deadline, reasoning that the time limit “must be strictly construed because it is a condition precedent to the waiver of sovereign immunity.” Ponsford v. United States, 771 F.2d 1305, 1309 (9th Cir. 1985) (citing multiple district court cases); Hill v. Mosby, 896 F. Supp. 1004, 1005 (D. Idaho 1995); Turner v. United States, 881 F. Supp. 449, 451 (D. Haw. 1995).

Nonetheless, Petitioner argues that equitable tolling applies and prevents dismissal, relying on an unpublished district court decision, Mack v. Internal Revenue Serv., 76 A.F.T.R. 2d (RIA) 6909, 1995 WL 556628 (E.D. Cal. 1995).<sup>2</sup> In Mack, the court reasoned that the United States Supreme Court’s decision in Irwin v. Dep’t of Veteran’s Affairs, 489 U.S. 89 (1990), abrogated controlling Ninth Circuit precedent and held that equitable tolling applies to the 20-day deadline. Id. at \*2-3. After considering the petitioner’s reasons for missing the deadline, however, the Mack court refused to apply equitable tolling based on the circumstances, and dismissed the case. Id. at \*4 (petitioner alleged he “was late because he had to do research, ‘get his papers together,’ and also attend to his business affairs,” and did not allege that “he had been misled . . . or induced by anyone to delay his petition.”). In general, courts apply equitable tolling “sparingly” in situations where a claimant has (1) diligently pursued judicial remedies, such as filing

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<sup>2</sup>At least one other district court in this circuit has reached the same conclusion. Mackenzie v. United States, 84 A.F.T.R. 2d 6725, 1999 WL 1001598 (E.D. Cal. 1999).

1 a complaint in the wrong court, or (2) been induced or tricked by an adversary's  
2 misconduct into allowing the filing deadline to pass. Irwin, 498 U.S. at 457-58 (refusing  
3 to apply equitable tolling to a "garden variety claim of excusable neglect" where the  
4 claimant's lawyer was away from the office when notice was served and failed to file  
5 within the 30-day deadline).

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7 Although the Supreme Court held in Irwin that equitable tolling applies to suits  
8 against the federal government, the Court's later decision in United States v. Brockamp,  
9 519 U.S. 347 (1997), casts doubt on whether equitable tolling applies to petitions filed  
10 under § 7609. In Brockamp, the Court held that equitable tolling does not apply to  
11 statutory deadlines for filing tax refund claims based on the emphatic and repetitive  
12 language used in the statute reiterating the deadlines, and Congress' failure to list  
13 equitable tolling as a statutory exception. 519 U.S. at 350-52. The Court noted that tax  
14 law "is not normally characterized by case-specific exceptions reflecting individualized  
15 equities," and that Congress decided that the "occasional unfairness in individual cases  
16 (penalizing a taxpayer whose claim is unavoidably delayed)" was necessary "to maintain  
17 a more workable tax enforcement system," numbering more than 200 million yearly tax  
18 returns. Id. at 352-53.

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20 The court, however, need not resolve whether equitable tolling applies to § 7609 in  
21 light of this jurisprudence, given Nelson's failure to allege sufficient facts warranting the  
22 application of equitable tolling. See Shisler v. United States, 199 F.3d 848, 852 (6th Cir.  
23 1999) (finding it unnecessary to determine whether equitable tolling applies to § 7609  
24 "because petitioners provide no factual reason why principles of equity should be applied  
25 in the present case."). Although Nelson alleges that he "diligently pursued" filing his  
26 petition and that "circumstances beyond his control" prevented him from filing within the  
27 statutory deadline, he fails to allege *any* facts in his petition supporting these conclusions.  
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1 Am. Pet. at ¶ 6. The court is not required to accept Nelson's conclusory and factually  
2 unsupported allegations. E.g., Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir.  
3 1985) (upholding district court's dismissal of conclusory complaint); Watt, 643 F.2d at  
4 624; Warren, 328 F.3d 1136 at 1139.

5 Further, Nelson's argument (raised for the first time in opposition to the  
6 Government's motion) that sending a complaint letter within the 20-day deadline  
7 constitutes a "defective pleading" warranting the application of equitable tolling, lacks  
8 support under the case law. The two cases on which Nelson relies present strikingly  
9 different facts. In both cases, the Supreme Court tolled the statute of limitations where  
10 plaintiffs filed complaints under the Federal Employers' Liability Act in state courts with  
11 proper jurisdiction, properly served the defendants, and were later transferred for  
12 improper venue. Burnett v. New York Cent. R.R. Co., 380 U.S. 424, 431, 434 (1965);  
13 Herb v. Pitcairn, 325 U.S. 77, 79 (1945). Here, however, Nelson sent a complaint letter  
14 by certified mail to multiple government officers and agencies opposing the IRS'  
15 summons of his bank account information. Nelson did not file his letter, or attempt in  
16 any other way to initiate legal action in state or federal court. Given the Supreme Court's  
17 recognition that federal courts apply equitable tolling "sparingly," the court finds that the  
18 factual differences distinguishing the cases relied on by Nelson from the case at bar  
19 would prevent the court from applying equitable tolling, even if Nelson obtained leave of  
20 court to amend his petition. Irwin, 498 U.S. at 96.

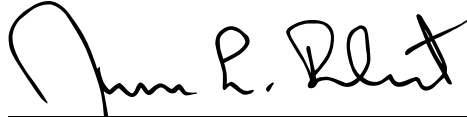
21 Finally, the court refuses Nelson's request for leave to amend his petition as an  
22 alternative to dismissal, as futile. When pressed by the court at oral argument to state  
23 every fact supporting Nelson's claim for equitable tolling (beyond his letter), Nelson's  
24 counsel stated that Nelson received the IRS summons when his regular counsel was  
25 abroad, and that local counsel received the summons the day before the 20-day deadline  
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1 expired and filed a petition to quash shortly thereafter. Yet, this is nearly the exact  
2 factual scenario that the Supreme Court declared “a garden variety claim of excusable  
3 neglect” and to which it refused to apply equitable tolling. Irwin, 498 U.S. at 96  
4 (refusing to extend equitable tolling where petitioner alleged that “his lawyer was absent  
5 from his office at the time that the EEOC notice was received, and that he thereafter filed  
6 within 30 days of the day on which he personally received notice.”). Thus, the court  
7 finds that Nelson can prove “no set of facts that would establish the timeliness of the  
8 claim,” and grants the Government’s motion to dismiss.<sup>3</sup> Supermail, 68 F.3d at 1207.

#### 10 IV. CONCLUSION

11 For the reasons stated above, the court GRANTS Respondent’s Motion to Dismiss  
12 Petition to Quash IRS Summons (Dkt. # 9).

13 Dated this 1st day of August, 2005.

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JAMES L. ROBERT  
United States District Judge

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<sup>3</sup>Although Nelson moves to strike the Government’s untimely and improper second reply brief cast as an “errata,” the court denies this motion given that the four paragraphs of new material submitted by the Government failed to influence the court’s decision. The court reminds the Government, however, to abide by Fed. R. Civ. P. 6(b) and to seek the court’s permission before filing an untimely brief.